

**Administrator Steven C. Preston**  
**U.S. Small Business Administration**  
**U.S. House of Representatives Small Business Committee**  
**Federal Government Efforts in Contracting with Women-Owned Small Businesses**

Thank you for inviting me to testify today on behalf of the U.S. Small Business Administration (SBA) regarding Federal Government Efforts in Contracting with Women-Owned Small Businesses. The proposed rule that will implement the Women-Owned Small Business Federal Contracting Procedures set-forth in P.L. 106-554 has been published. Public comments on the proposed rule are due by February 25. SBA has been, and remains committed to implementing the statutorily-authorized set-aside for women-owned businesses and intends to do so in a constitutionally-valid manner, while at the same time meeting the specific directives provided in the legislation.

History

In 1994, through the Federal Acquisition Streamlining Act (FASA), Congress established a statutory goal of not less than 5 percent of the total value of all Federal Government prime contract and subcontract awards for each fiscal year going to women-owned small businesses (WOSBs). The Federal Government made consistent progress toward reaching the prime goal. Federal prime contract dollars going to WOSBs increased from \$2.4 billion in FY 1994 to \$11.6 billion in FY 2006 (3.4 percent of contracting dollars). Subcontracting dollars have increased from \$3.6 billion in FY 2000 to over \$10.1 billion in FY 2006 representing 6 percent of subcontracting dollars. SBA's Office of Government Contracting and Business Development (GCBD) is working closely with Offices of Small Disadvantaged Business Utilization (OSDBUs) in the major Federal procuring agencies to promote the use of women-owned small businesses and encourage them to reach the 5 percent goal.

In December of 2000, Congress passed legislation creating the framework for Women-Owned Small Business Federal Contracting Procedures.

Consistent with the requirement in the legislation for SBA to determine the underrepresentation of WOSBs in the Federal contracting marketplace, SBA itself conducted a study to establish the necessary findings. Once completed, an independent panel of experts at the National Academy of Sciences (NAS) reviewed the study to assess the sufficiency and validity of SBA's methodology. Ultimately, NAS concluded that the original SBA study was flawed. NAS recommended a methodology for performing a study that would more effectively withstand legal and statistical scrutiny.

## RAND Report

On February 21, 2006, SBA awarded a contract to the RAND Corporation and it commenced work on a study, in accordance with the methodology recommended by NAS, to determine those industries in which women-owned small businesses are underrepresented and substantially underrepresented in Federal procurement. The RAND study was completed in April 2007 and since then SBA has been engaged in a government-wide effort to complete this proposed rule in a manner that will satisfy both statutory and constitutional requirements.

Based on NAS guidance, RAND defined underrepresentation as a disparity ratio of 0.80, while substantial underrepresentation was defined as a ratio of 0.50. The NAS recommended applying this analysis to data found in the 2004 CCR and 2005 procurement data and four digit North American Industry Classification System (NAICS) codes based on contract dollar amount and the number of contracts. With the disparity thresholds of 0.50 and 0.80 established, RAND examined 28 different approaches that looked at a wide range of data collected by the federal government including data in the Central Contractor Registration (CCR), the Federal Procurement Data System/Next Generation (FPDS/NG) and the 2002 Survey of Business Owners (SBO) from the five-year economic Census. Relying on the guidance offered by the NAS and the actual results of parsing the data, RAND then began to zero-in on those methods that accurately measured underrepresentation and substantial underrepresentation. The methodology utilizing the dollar amount was found to be the most valid measure of WOSB contract participation because:

- Most importantly, the very goal (5 percent WOSB) the statute was intended to support is based on contracting dollars, and thus using contract dollars as the primary measure of participation is most consistent with the statutory scheme;
- In addition, Congress appropriates federal funding in dollars;
- The Federal budget is divided in dollars;
- All government contracts are awarded in dollars;
- The accounting and auditing processes focus on how dollars are spent; and
- Contract actions do not allow for an accurate accounting of the financial benefits of business development that occur when small businesses receive federal contracts.

Based on the determined methodology, four industries were identified where women-owned small businesses were either underrepresented or substantially underrepresented:

- National Security and International Affairs;
- Coating, Engraving, Heat Treating, and Allied Activities;
- Household and Institutional Furniture and Kitchen Cabinet Manufacturing; and
- Other Motor Vehicle Dealers.

### Constitutional Concerns

While the role of SBA is to aid, counsel and assist small businesses, it is not the role of the agency to advise on questions of law. Therefore, the SBA worked closely with the Department of Justice in drafting a proposed rule that is cognizant of the exacting constitutional requirements that apply in implementing a gender specific set-aside program. According to Supreme Court precedent, the Equal Protection Clause requires “skeptical scrutiny of official action denying rights or opportunities based on sex,” and any gender-based preference program must be supported by an “exceedingly persuasive justification.” *United States v. Virginia*, 518 U.S. 515, 533 (1996). As applied to the Federal Government, the constitutional standards prohibit federal agencies from discriminating on the basis of gender in awarding of federal contracts unless the preference furthers important governmental objectives and the means employed are substantially related to the achievement of those objectives. *Id.* at 533 (1996)

In order to conform to these constitutional standards, simply finding underrepresentation generally will not suffice to sustain the set aside of contracts for women-owned businesses. The equal protection standards the Supreme Court has articulated for gender programs have been applied by Federal courts to invalidate numerous WOSB contracting programs imposed by state and local governments when studies and other statistical evidence failed to demonstrate sufficient evidence of relevant discrimination. Consequently, we concluded that the soundest means of assuring constitutional compliance is for the agency to determine that setting aside those contracts solely for women-owned small businesses is substantially related to remedying gender discrimination in the relevant industry or contracting sector.

### Summary of the Regulation

The proposed rule will assist WOSBs in procuring contracting opportunities with the federal government by providing procedures for certifying a business as an eligible WOSB, protesting eligibility determinations and awards, as well as providing a framework for agencies to make the determination that women-owned small business underrepresentation is related to gender discrimination. In addition, the rule sets forth when contractors can restrict competition to WOSBs.

### Women’s Procurement Goal

SBA's goal is not only to develop regulations implementing these procedures, but to help women-owned small businesses so they can compete both in the private market place and for federal contracts.

In analyzing the data found in the RAND study, we recognize that the real issue is that there are not enough WOSBs registered in CCR. As a result, we are analyzing what we have done in the past and what additional steps we can take to increase the number of WOSBs able to pursue federal contracts.

SBA has been working with its resource partners to educate women entrepreneurs not only on how to contract with the federal government, but on how to establish and grow their businesses. Currently, SBA provides business counseling and events including business matchmaking and networking opportunities through SBA field offices located around the country and through SBA resource partners, including Small Business Development Centers (SBDCs), SCORE and Women Business Centers (WBCs), that counsel prospective business owners on elements necessary to start a business.

SBA is taking a forward-looking approach. First, our programs are tasked with growing the universe of WOSBs and encouraging these businesses to register with the CCR, thus making these businesses eligible to contract with the federal government. Second, the role of SBA is to help those businesses become ready, willing and able to undertake and build a successful track record working with the federal government.

These initiatives will help WOSBs to achieve the congressionally- established goals. We must remember that there is no single magical approach that will expand the participation of women-owned small businesses in federal procurement; rather a combination of initiatives that take into account the individual needs of businesses is the best approach to provide opportunities for women small business owners to do business with the Federal Government.

The WOSB rule submitted by the SBA represents careful analysis which culminated in a proposed rule utilizing the most appropriate measures and methodology as well as the most pertinent legal advice. SBA fully supports women owned businesses and will take all necessary steps to implement this rule.

Thank you for the opportunity to testify today. I look forward to any questions that you may have.